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Recommended Citation

Reply Brief, *Utah v. Christensen*, No. 20641.00 (Utah Supreme Court, 1986).

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	20641
Plaintiff/Respondent	:	
-v-	:	
GEORGE EDWARD CHRISTENSEN	:	Case No. 20641
Defendant/Appellant	:	Category No. 2

REPLY BRIEF OF APPELLANT

Appeal from a conviction and judgment of Murder in the Second Degree, a First Degree Felony, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Judge, presiding.

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FILED

SEP 11 1986

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
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-v-	:	
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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent	:	
-v-	:	
GEORGE EDWARD CHRISTENSEN,	:	Case No. 20641
Defendant-Appellant	:	

REPLY BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal from a judgment against George Edward Christensen for Murder in the Second Degree, a First Degree Felony, in violation of Utah Code Ann. §76-5-203 (1953 as amended). A jury found Mr. Christensen guilty following a trial from December 12 through December 20, 1984, in the Third Judicial District in and for the County of Salt Lake, State of Utah, the Honorable Ernest F. Baldwin, Jr., Judge, presiding. On March 22, 1985, Mr. Christensen was sentenced by the court to a term of incarceration for five years to life. Appellant Christensen filed his opening brief on appeal on December 26, 1985; the State filed the Respondent's Brief on April 24, 1986. The Court consolidated this case with another and filed a per curiam opinion on May 1, 1986, State v. Stewart and State v. Christensen, 33 Utah Adv. 15. Appellant filed a Petition for Rehearing. The Court granted Petition on August 12, 1986 and permitted Appellant thirty days in which to file a reply brief (Addendum A). This is the reply brief requested by the Court.

STATEMENT OF FACTS

The facts are set forth below as necessary and in detail in the Brief of Appellant at 1-4.

ARGUMENT

THE EVIDENCE INTRODUCED AT TRIAL WAS INSUFFICIENT TO SUSTAIN A CONVICTION OF MR. CHRISTENSEN.

The primary contention advanced by Mr. Christensen in his opening brief was that the evidence was insufficient to convict him of second degree murder and, further, that the jury's verdict in this case was irrational. The standard articulated by this Court for reviewing a challenge to the sufficiency of evidence is that the evidence and all reasonable inferences drawn therefrom will be viewed in a light most favorable to the jury's verdict and to set aside a jury verdict, the evidence must be "sufficiently inconclusive or so inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." State v. Rebeterano, 681 P.2d 1265, 1266 (Utah 1984); State v. Garcia, 663 P.2d 60, 63 (Utah 1983). Even stretching the evidence to its logical limit, however, the Court may not take a speculative leap to bridge the gap between the evidence needed to convict and the evidence actually presented at trial. State v. Petree, 659 P.2d 443, 445 (Utah 1983).

This standard is an external one to be applied by the reviewing court in determining whether or not the evidence produced at trial was sufficient to support a guilty verdict. The present case, however, presents a rare instance wherein a sufficiency standard is applied internally by a jury determining what evidence was required to convict. In this case four Utah State Prison inmates were charged and tried jointly with criminal homicide arising from an incident at the prison (Appellant's Brief at 3). At the conclusion of the trial two defendants, Dominguez and Coleman, were acquitted while two other defendants, Christensen and Stewart, were convicted (Appellant's Brief at 4; R.182-185). The jury obviously found the evidence insufficient with respect to two defendants, thus supplying an internal standard for sufficiency of the evidence. On appeal, Mr. Christensen contends that the evidence presented at trial was no more, and perhaps less, incriminating with respect to him than it was with respect to another co-defendant, Frank Dominguez, who was acquitted. Therefore, the evidence against Appellant Christensen was insufficient to convict him of second degree murder.

At this juncture, a review of the evidence with respect to Mr. Christensen is necessary (a more comprehensive review is found in Appellant's Brief at 6-16).

The entire episode transpired among inmates at the Utah State Prison on February 14, 1984. In the morning of February 14, inmate Glen Evert confronted Frank Dominguez and Dail Stewart who

were leaders of a group which Evert suspected was responsible for the theft of some of his property (T.353). A fight ensued between Evert and Dominguez (T.359) and, later in the day, between Evert and Stewart (T.364).

At approximately 9:00 p.m. Evert was confronted in a bathroom by a large group of inmates which ultimately included Dominguez, Stewart, and Christensen (T.377, 662-664). Many of the inmates were armed with Stewart carrying the only knife capable of inflicting the fatal wound. 33 Utah Adv. Rep. at 16. Mr. Christensen was seen with a very large machete-like weapon (T.382-383, 418, 667-668). As the group started to back out of the bathroom, the bathroom door was kicked, hitting Evert, whereupon defendants Dominguez, Stewart, and Christensen and at least one other person attacked the victim, Evert (T.677). One witness saw Mr. Christensen "lunge forward with the weapon he had, striking in an overhand motion" (T.678). However, Evert managed to block the blows, break away and run to the far east end of the dorm (T.679).

After breaking out of K dorm, defendants Stewart, Dominguez, Christensen, and Tommy Coleman pursued the victim (T.680), with Mr. Christensen still carrying the machete-like knife (T.682). A witness saw the victim make contact with a tall Hispanic in front of G dorm, push the man away, and then proceed north on the catwalk (T.686). However, after this confrontation, the victim appeared to be favoring his right shoulder, running like he was hurt and injured (T.687). The witness then saw the victim run through E dorm, grapple with the group following him, and break away again (T.689-90). Finally, the witness saw long objects and

the victim get tackled and go down at the far end of C dorm (T.691-2). The witness testified that the group attacked Mr. Evert, "hacking and stabbing downward," as the victim blocked and kicked (T.692). The group then dispersed (T.693).

James J. Hill, also an inmate at the prison when this event occurred, testified that he was standing in the doorway of C dorm around 9:00 on the evening of February 14, 1984 because he had heard some commotion outside (T.197-8). Mr. Hill saw the victim run past him and then saw Defendant Coleman tackle him (T.207). Then, Mr. Christensen and some others descended upon the victim and make flailing motions with his hands (T.211). However, on cross-examination, Mr. Hill admitted to making a different statement shortly after the incident (T.236):

Q. (by Mr. Valdez) Okay. Do you recall Detective Beckstead asking you the question and you providing this answer:

Did you see anybody specifically that punched him in the chest while he was down?

Answer: No, but it could--it was both the Stewarts right there and Dominguez. It would have been one of them."

Do you recall answering that?

A. I recall the answer, yes.

Q: No mention of Christensen; correct?

A. That's correct.

Mr. Hill also said he overheard a conversation between defendants Christensen and Dominguez while they were all secluded in maximum security after the incident in which Mr. Christensen told Mr. Dominguez not to worry, "they ain't got no fingerprints because you know why," whereupon Mr. Christensen made a motion like he had gloves (T.223).

The State also called a former inmate, Mr. Charles Stein, who was at the prison when this event took place. Mr. Stein stated that upon returning from making a phone call, he was ascending the stairwell between B and D dorms between 9:00 and 9:30 and saw the victim coming down holding his chest. Mr. Stein then saw Defendant Christensen standing on the stairs with a knife in his hand (T.44). The knife was approximately 8 inches long and 1 and half to 2 inches wide, and looked like it was stained (T.45). Mr. Stein also saw a crowd of people at the top of the stairs (T.46). Stein admitted that he had not given this information to anyone until the day before trial (T.48).

The evidence and testimony cited above originated from prosecution witnesses. They were the very witnesses the jury must have believed to have returned a conviction. Yet Appellant's opening brief and this brief demonstrate the lack of evidence presented by the prosecution to support a conviction. The original per curiam opinion in this case clearly states that Stewart not Mr. Christensen carried the only knife capable of causing the fatal wound to the victim. State v. Stewart and Christensen, 33 Utah Adv. Rep. at 16.

Since, as the opinion notes, Mr. Christensen did not inflict the fatal wound to the victim, the only theory which would support a conviction would be that Mr. Christensen encouraged or aided in the commission of the offense under Utah Code Ann. §76-2-202 (1953 as amended). Indeed, this is the position espoused by the State in its brief. However, in his opening brief Appellant demonstrated that he was no more culpable than another co-defendant,

Frank Dominguez, who was acquitted by the same jury. Dominguez also acted as an aider and abettor to the offense (Appellant's Brief at 12-13). Because of the obvious inconsistency of the jury's verdicts with respect to Dominguez and Appellant, Mr. Christensen contends that the jury's finding of guilt in his case was irrational and should be overturned (Appellant's Brief at 13-16).

Where the evidence is the same against multiple defendants, some courts have held that a verdict convicting some defendants while acquitting other defendants is irrational and inconsistent and must be overturned. See, for example, People v. Angelopoulos, 86 P.2d 873 (Cal. 1939); State v. Gager, 370 P.2d 739 (Haw. 1962); State v. Hirsch, 131 N.E.2d 419 (Ohio 1956); People v. Beasley, 353 N.E.2d 699 (Ill. App. 1976); and People v. Fallon, 432 N.Y.s. 2d 225 (App. Div. 1980). One court has stated that exactness of the evidence is unnecessary; however, the evidence against multiple defendants should be "in effect in every respect the same." Territory v. Thompson, 26 Haw. 181 (1921) as cited in State v. Gager, supra. In other cases considering this problem, the consensus seems to be that so long as the evidence against the convicted defendant is greater than that against the acquitted defendant, the verdict is not irrational. Pyrdol v. State, 617 P.2d 513 (Alaska 1980); State v. Remington, 515 P.2d 189 (Or. 1973). However, Appellant contends that in this case, allowing the inconsistent verdicts to stand would be to condone the type of irrationality and arbitrariness generally abhorred by our legal system.

As noted above, neither Mr. Christensen nor Mr. Dominguez was responsible for the fatal blow to the victim. However, the evidence substantiates that both of these defendants were involved in some sort of attack upon the victim. The question is whether or not the evidence was stronger against Mr. Christensen, or whether in fact "the evidence in effect is in every respect the same against" both defendant Christensen and Mr. Dominguez. Obviously, the evidence against Mr. Christensen and Mr. Dominguez was not exactly the same.

Summarizing the evidence, both defendants had weapons and both attempted to accost the victim in the bathroom of K dorm (T.665-677). However, defendant Dominguez had a motive in wanting to harm the victim since he had been accused of stealing and attacked by the victim earlier in the day (T.359). Mr. Christensen had no such prior involvement.

Both defendant Christensen and defendant Dominguez were identified by a prosecution witness at trial as "flailing" with weapons on the victim while he was on the ground outside of C dorm (T.211, 236). However, shortly after the incident when questioned by police, the witness made no mention of Mr. Christensen and only remembered seeing defendants Dominguez and Stewart and Stewart's brother at this time (T.236). The witness' testimony about a conversation in maximum security where he allegedly heard defendant Christensen assuring defendant Dominguez because they had worn gloves, (T.223) would be equally incriminating for both defendants. (A more extensive review of the evidence is found in Appellant's Brief at 6-16).

Considering and weighing all the evidence against both Mr. Christensen, who was convicted, and Dominguez, who was acquitted, favors neither over the other. Rather, both were equally culpable and the evidence "in effect is in every respect the same against" both of them. The jury found the evidence insufficient to convict Dominguez of second degree murder. Therefore, the evidence must also have been insufficient as to Mr. Christensen. To have found otherwise in light of all the evidence was inconsistent, irrational, and arbitrary and, therefore, the verdict must be set aside.

CONCLUSION

Since the evidence was insufficient to convict and since the jury's verdict was inconsistent and irrational, Appellant seeks reversal of his conviction and remand of his case to the District Court with an Order for dismissal of the charges or, in the alternative, a new trial.

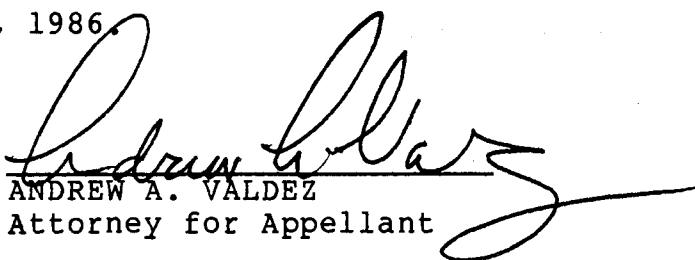
Respectfully submitted this 11 day of September, 1986.



ANDREW A. VALDEZ
Attorney for Appellant

CERTIFICATE OF SERVICE

I , ANDREW A. VALDEZ, hereby certify that four copies of the foregoing Appellant's Brief will be delivered to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 11 day of September, 1986.


ANDREW A. VALDEZ
Attorney for Appellant

DELIVERED by _____ this ____ day of September, 1986.

ADDENDUM A

813.86

SUPREME COURT OF UTAH

STATE OF UTAH

SALT LAKE CITY, UTAH

August 12, 1986

OFFICE OF THE CLERK

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The State of Utah,
Plaintiff and Respondent,
v.
George Edward Christensen,
Defendant and Appellant.

No. 20641

THIS DAY, Petition for Rehearing is granted pursuant to Rule 35. Defendant is permitted thirty days from this date to file a reply brief, after which the Court will make final disposition as it determines appropriate under Rule 35(c) of the Utah Rules of Appellate Procedure.

Geoffrey J. Butler, Clerk